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## SYED ISKANDAR SYED JAAFAR v. DATO' SRI ISMAIL SABRI YAAKOB & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD KAMAL MD SHAHID J
[JUDICIAL REVIEW NO: WA-25-533-10-2022]
31 OCTOBER 2022

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**Abstract** – *His Majesty Seri Paduka Baginda Yang di-Pertuan Agong ('YDPA') as a constitutional monarch and Head of State, is the ultimate decision maker and the decision by the YDPA in respect of the dissolution of Parliament is non-justiciable in any proceedings in court. In fact, the proclamation and dissolution of Parliament is a matter within the Executive or Legislature's exclusive sphere that should not be entertained by the Judiciary.*

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***ADMINISTRATIVE LAW:*** *Judicial review – Application for leave – Challenge against request by Prime Minister ('PM') to Yang di-Pertuan Agong ('YDPA') to dissolve Parliament – Whether PM should consult cabinet for advice – Whether YDPA ultimate decision-maker – Whether YDPA acted in own discretion to dissolve Parliament upon PM's request – Whether YDPA's decision non-justiciable – Whether amenable to judicial review – Federal Constitution, arts. 40(1), (1A), 40(2)(b), 55(2) & (4)*

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The applicant filed an application for leave to commence judicial review proceedings pursuant to O. 53 of the Rules of Court 2012. The reliefs sought by the applicant, *inter alia*, were (i) a declaration that the request by the first respondent to His Majesty Seri Paduka Baginda Yang di-Pertuan Agong on 9 October 2022 for the dissolution of Parliament under arts. 40(2)(b) and 55(2) of the Federal Constitution ('FC') was null and void and of no effect; and (ii) a direction of the nature of a writ of prohibition to prohibit the second respondent from taking any steps to conduct the 15th General Election in furtherance of the dissolution of Parliament. The applicant, contending that he was not challenging the decision of the YDPA to dissolve Parliament but the validity of the request by the first respondent to dissolve Parliament, as the request was made for an improper purpose or collateral purpose, and was therefore, an abuse of power.

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**Held (dismissing application with no order as to costs):**

**(1)** The subject matter in the instant case involved the proclamation and the dissolution of Parliament in consequence of the consent given by the YDPA, acting in his own discretion under arts. 40(2)(b) and 55(2) of the FC, upon request made by the first respondent. The matter of proclamation and dissolution of Parliament is non-justiciable. It is a

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matter within the Executive or Legislature's exclusive sphere that should not be entertained by the Judiciary. The first respondent had received the royal consent for Parliament to be dissolved, the resultant effect of which a general election must be held within 60 days, in accordance with art. 55(4) of the FC. (paras 43, 44 & 46)

**(2)** As the supreme leader, the first respondent need not consult his Cabinet in matters such as the dissolution of Parliament. Further, since the dissolution of Parliament was made under arts. 40(2)(b) and 55(2) of the FC, the Cabinet advice under art. 40(1) and (1A) of the FC was not an issue. The YDPA acted in His Majesty's own discretion to dissolve Parliament at the Prime Minister's request. The YDPA is the ultimate decision maker with the constitutional authority to make a final and non-justiciable determination with legal effect for the dissolution of Parliament. The respondents have no such decision-making power under the FC. Hence, the challenge against the validity of the request to dissolve Parliament was of no merit and the application was non-justiciable and frivolous. The subject matter was therefore not amenable to judicial review. (paras 54-56, 58 & 59)

**Case(s) referred to:**

*Council Of Civil Service Unions v. Minister for the Civil Service [1985] AC 374* ***(refd)***

*Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal [2019] 4 CLJ 561 FC* ***(refd)***

*Stephen Kalong Ningkan v. Tun Abang Hj Openg And Tawi Sli [1966] 1 LNS 186 FC* ***(refd)***

*Tan Sri Musa Hj Aman & Ors v. Tun Datuk Seri Panglima Hj Juhar Hj Mahiruddin & Ors [2021] 3 CLJ 87 CA* ***(refd)***

*Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA* ***(refd)***

*Teh Cheng Poh v. PP [1978] 1 LNS 202 PC* ***(refd)***

*Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v. Yang Maha Mulia Pemangku Raja Kelantan & Ors [2010] 1 LNS 1390 HC* ***(refd)***

*WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC* ***(refd)***

**Legislation referred to:**

Federal Constitution, arts. 32(1), 40(1), (1A), (2)(b), 55(2), (4), 113(1)

Rules of Court 2012, O. 53 r. 2(3), (4), O. 92 r. 4

**Other source(s) referred to:**

Emeritus Prof Datuk Dr Shad Saleem Faruqi, *Our Constitution* Sweet & Maxwell Asia Thomson Reuters 2019, p 209

*For the applicant - Gopal Sri Ram, R Kengadharan, Yasmeen Soh, Phyllia Lim & Dhanesh Nair; M/s R Kengadharan & Co*

*For the respondents - Shamsul Bolhassan & Ahmad Hanir Hambaly; SFCs & Lew Wen; Zhen FC*

*Reported by S Barathi*

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## JUDGMENT

**Ahmad Kamal Md Shahid J:**

**Introduction**

B **[1]** On 14 October 2022, the applicant filed an application for leave to commence judicial review proceedings pursuant to O. 53 of the Rules of Court 2012 (ROC).

**[2]** The applicant seeks, *inter alia*, the following reliefs:

C (i) a declaration that the request by the first respondent to His Majesty Seri Paduka Baginda Yang di-Pertuan Agong on 9 October 2022 for the dissolution of Parliament under arts. 40(2)(b) and 55(2) of the Federal Constitution (FC) is null and void and of no effect;

D (ii) a direction of the nature of a writ of prohibition to prohibit the second respondent and its servants or agents or employees from taking any steps to conduct the 15th General Election (GE15) in furtherance of the dissolution of Parliament;

(iii) no order as to costs; and

E (iv) such further or other relief as may be moulded by this Honourable Court under O. 53 r. 2(3) and/or under O. 92 r. 4 of the ROC as the facts and circumstances of the case demand.

**Background Facts**

F **[3]** The applicant is an advocate and solicitor of the High Court of Malaya. He is also a registered voter and voted in the 14th General Election in the Pandan constituency. He is by law a person entitled to participate in a general election.

**[4]** The first respondent is the ninth Prime Minister of Malaysia from 21 August 2021.

G **[5]** The second respondent is the Chairman of the Election Commission of Malaysia.

**[6]** The third respondent is the Government of Malaysia.

**[7]** On 9 October 2022, the first respondent had an audience with His H Majesty Seri Paduka Yang di-Pertuan Agong (YDPA). The first respondent made a request from the YDPA for the dissolution of Parliament.

**[8]** Upon request made by the first respondent, on 10 October 2022 the YDPA decided to dissolve the Parliament.

I **[9]** On 14 October 2022, the applicant filed this application for leave to commence judicial review proceedings pursuant to O. 53 of the ROC.

**[10]** The grounds for this application are as follows:

(i) On 9 October 2022, the first respondent had an audience with the YDPA. At the said audience, the first respondent made a request for the dissolution of Parliament. On 10 October 2022, the first respondent issued a media statement that the YDPA had approved his request to dissolve the 14th Parliament.

(ii) The first respondent acted unreasonably when exercising his power to make the said request because a reasonable holder of the power to make the said request would not have made it given the conditions prevailing in the country.

(iii) The first respondent acted in breach of his fiduciary duty when he made the said request because he failed to have any or any sufficient concern for the welfare and interests of the poorer sections of the voting public when making the said request.

(iv) The said request was made for an improper purpose or collateral purpose and therefore an abuse of power. In particular:

(a) He failed to take into account the interests and welfare of the poorer segment of Malaysian society who will be affected by the monsoon weather of which the first respondent is and was at all material times fully aware.

(b) He failed to ask himself about the negative impact on the general population that will be caused by the oncoming floods in the country.

(c) He took into account political considerations instead of weighing the harm and inconvenience that will be suffered by the voting public by holding a general election at the present moment given the conditions of weather in the several States and Districts of Malaysia.

(d) He took into account the interests of particular third parties facing criminal proceedings such as Dato' Seri Ahmad Zahid bin Hamidi (Zahid Hamidi), the President of a political party, UMNO, who is facing prosecution for criminal breach of trust in a trial at which his defence has been called.

(v) The said request was made by the first respondent acting under the dictation of the said Zahid Hamidi instead of acting independently. The first respondent succumbed to the influence and pressure brought to bear upon him by the said Zahid Hamidi. The first respondent therefore did not act as an independent agent when he made the said request.

**[11]** The applicant stated that accordingly the request for dissolution is null and void and of no effect. The dissolution of Parliament on 10 October 2022 taken upon a void and unlawful act is therefore unlawful.

**[12]** The applicant further stated that any steps that may be taken by the second respondent and its servants or agents or employees for the purpose of conducting a general election in furtherance of the aforesaid dissolution are therefore unlawful and liable to restrained by a writ of prohibition.

**[13]** It is important to note that on 21 October 2022 during the submission of the parties on leave application before this court, the Election Commission of Malaysia announced that nomination day had been set for 5 November 2022, early voting on 15 November 2022 and polling day on 19 November 2022.

**The Law**

**[14]** The Federal Court in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478; [2012] 4 MLJ 296; [2012] 4 MLRA 257; speaking through Suriyadi Halim Omar FCJ (as His Lordship then was) held:

> ... Leave may be granted if the leave application is **not thought of as frivolous, and if the leave is granted, an arguable case of granting the reliefs sought at the substantive hearing may be the resultant outcome**. A rider must be attached to the application though, *ie*, unless the matter for judicial review is amenable to judicial review no success may be envisaged. (emphasis added)

**[15]** The test for leave to commence a judicial review laid down in *WRP Asia Pacific Sdn Bhd* (*supra*) is as follows:

(i) whether the subject matter is amenable to judicial review; and if so

(ii) from the materials available, whether the application is frivolous and if not thought as frivolous, to consider that the applicant has an arguable case to obtain the relief sought at the substantive hearing.

**[16]** The principle governing applications for leave to commence judicial review proceedings had also been set out in *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927; [2006] 1 MLRH 507; [2006] 5 MLJ 60 where Gopal Sri Ram JCA (as His Lordship then was) held:

> ... *the High Court should not go into the merits of the case at leave stage.* Its role is only to see if the application for leave is frivolous ... *So too will the court be entitled to refuse leave if it a case where the subject matter of the review is one which by settled law (either written law of the common law) is non-justiciable.* (emphasis added)

**[17]** It is trite that the applicant will have to satisfy the test or requirement propounded in the abovementioned cases in order to secure the leave, to commence the judicial review proceedings. At this stage, this court need not go into the merits of the case, but only to see if the subject matter is amenable to judicial review or not; whether the application for leave is frivolous and whether an arguable case of granting the reliefs sought at the substantive hearing may be the resultant outcome.

**Applicant's Submission**

**[18]** The applicant submitted that the application for leave ought to be allowed based on the following grounds.

**[19]** The applicant submitted that he is not challenging the decision of the YDPA to dissolve the Parliament. In fact, he is challenging the validity of the request by the first respondent to the YDPA to dissolve the Parliament.

**[20]** It was submitted that the first respondent's request was made for an improper purpose or collateral purpose and was therefore an abuse of power. The particulars are, *inter alia*, as follows:

(i) failure to take into account the interests and welfare of the poorer segment in Malaysia who will be affected by the monsoon weather;

(ii) failure to ask himself about the negative impact on the general population that will be caused by the oncoming floods; and

(iii) failure to properly exercise his fiduciary power by taking into account political considerations instead of weighing the harm and inconvenience that will be suffered by the voting public.

**[21]** The applicant further submitted that instead of acting independently, the first respondent made the request under the dictation of the President of UMNO who is facing prosecution for criminal breach of trust in a trial at which his defence has been called. The applicant averred that the said President hoped that GE15 would be won by his party and its political allies in which steps would be taken to halt and discontinue the said criminal trial.

**[22]** In addition, the applicant submitted that the request which was made for an improper purpose is corroborated by the statement made by the President at the meeting of the Malaysian Indian Congress held on or about 10 October 2022.

**[23]** Lastly, the applicant submitted that the request is null and void and of no effect. Any steps that may be taken by the second respondent and its servants or agents or employees for the purpose of conducting a general election in furtherance of the alleged unlawful dissolution is therefore unlawful and liable to be restrained by a writ of prohibition.

**The Attorney General's Submission**

**[24]** The learned Senior Federal Counsel (SFC) objected to this leave application on four grounds as follows:

(i) the respondents are not the actual decision maker for the dissolution of the 14th Parliament;

(ii) the actual decision maker and subject matter sought cannot be reviewed by the court;

(iii) the applicant failed to establish *locus standi*; and

(iv) the reliefs sought cannot be granted in law.

**[25]** Importantly, the learned SFC submitted that the effect of the reliefs sought by the applicant is to reverse the dissolution of Parliament and to prohibit the conduct of GE15 pursuant to the dissolution.

**[26]** On the first ground, the learned SFC submitted that the first respondent is not the decision maker for the dissolution of Parliament. In fact, the YDPA is the decision maker under art. 40(2)(b) of the FC.

**[27]** The provision of art. 40(2)(b) of the FC is as follows:

> **40 Yang di-Pertuan Agong to act on advice**
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> ...
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> (2) The Yang di-Pertuan Agong may act in his **discretio**n in the performance of the following functions, that is to say:
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> (a) the appointment of a Prime Minister;
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> (b) **the withholding of consent to a request for the dissolution of Parliament**;
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> (c) the requisition of a meeting of the Conference of Rulers concerned solely with the privileges, position, honours and dignities of Their Royal Highnesses, and any action at such a meeting,
>
> and in any other case mentioned in this Constitution.
>
> (emphasis added)

**[28]** The learned SFC submitted that art. 40(2)(b) is in line with art. 55(2) which provides:

> **55 Summoning, prorogation and dissolution of Parliament**
>
> (2) **The Yang di-Pertuan Agong may prorogue or dissolve Parliament**.
>
> (emphasis added)

**[29]** On the second ground, the learned SFC submitted that the true nature of the applicant's application is to challenge the dissolution of Parliament, being a decision made by the YDPA in his discretion under art. 40(2)(b) of the FC.

**[30]** The learned SFC further submitted that the YDPA cannot be liable in any proceedings in court in respect of official functions pursuant to art. 32(1) of the FC.

**[31]** The provision of art. 32(1) of the FC is as follows: A

> **Supreme Head of the Federation and his Consort**
>
> (1) There shall be a Supreme Head of the Federation, to be called **the Yang di-Pertuan Agong**, who shall take precedence over all persons in the Federation and **shall not be liable to any proceedings whatsoever in any court except in the Special Court established under Part XV**. B
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> (emphasis added)

**[32]** The learned SFC submitted that matters relating to the dissolution of Parliament could not be properly made the subject of judicial review. The Attorney General relied on the case of *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 where Lord Roskill made the following ruling: C

> Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, *the dissolution of Parliament* and the appointment of ministers as well as others **are not,** *I think susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether* a treaty should be concluded or the armed forces disposed in a particular manner or *Parliament dissolved on one date rather than another.* (emphasis added) D E

**[33]** The learned SFC further submitted that there is no reason to depart from the well-established principle that the dissolution of Parliament is outside the ambit of the court to review.

**[34]** On the third ground, the learned SFC submitted that the applicant failed to establish *locus standi* in showing that he is adversely affected by the decision of dissolution of Parliament as required under O. 53 r. 2(4) of the ROC. F

**[35]** The learned SFC submitted that the applicant did not show his legal rights are adversely affected by the dissolution. A dissolution of Parliament and the conduct of a general election would in fact enable the applicant to exercise his right to vote as a registered voter. G

**[36]** On the fourth ground, the learned SFC submitted that an order cannot be granted if it has the effect of an injunction restraining the Government or its officers from performing their functions. In the instant application, it would have the effect of restraining the second respondent from carrying out its constitutional function under arts. 55(4) and 113(1) of the FC. H

**[37]** The learned SFC further submitted that the members of the second respondent are appointed by the YDPA. To prohibit the second respondent, its servants or agents from conducting the general election is in effect to restrain them from carrying out their function, contrary to the YDPA's decision and the various articles under the FC. I

**[38]** Lastly, the learned SFC submitted that the application for leave ought to be dismissed.

## The Decision Of The Court

*Justiciability*

**[39]** In determining whether this matter is justiciable or not, I refer to the case of *Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v. Yang Maha Mulia Pemangku Raja Kelantan & Ors* [2010] 1 LNS 1390; [2010] 11 MLRH 277; [2011] 1 MLJ 128. In defining the concept of justiciability, Mohamad Ariff Md Yusof J (as His Lordship then was) stated this:

> **The Concept Of Justiciability**
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> Justiciability relates to the sixth ground stated above – whether judicial review is an appropriate procedure. It can be subsumed even under grounds (v) and (iv). The issue can also be stated as whether the subject matter is 'amenable to judicial process', a phrase which appears in the House of Lords decision in *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935; [1985] 1 AC 374, per Lord Roskil. Generally, *an issue is regarded as non-justiciable where a court of law or the court process is ill-suited to decide the issue by reason of lack of competence, unsuitability of the legal method, lack of satisfactory criteria for a judicial determination of the dispute at hand, or where constitutional, common or statutory laws expressly or contextually insulate it from judicial determination.*
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> The learned authors of *Duma Das Basu's Human Rights in Constitutional Law* (2nd Ed, Reprint 2005) observe with deserving scholarship as follows:
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> > *Limits of Judicial Review of Executive Acts*
> >
> > *Even where it appears prima facie that some fundamental right has been violated by an Executive Act, the Court cannot interfere with that act on the ground of unconstitutionality because of general principles relating to the limits of the judicial method and the rule of the judiciary, and the lack of satisfactory criteria for a judicial determination of certain questions.*
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> > *Non-justiciable Issues*
> >
> > *In connection with the unconstitutionality of legislation, we have seen that even where a fundamental right has been invaded by a statute, the individual who is affected thereby may not have a remedy from a Court of Law, because the issue involved is not justiciable.*
> >
> > ... The most prominent amongst non-justiciable issues are those which are known in the U.S.A. as 'political questions', which means that the subject matter of the question is such that it is not capable of a judicial determination (at p 256).
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> *The learned authors of De Smith's Judicial Review (6th Ed) have also appropriately observed in this connection that despite the wholesome development of administrative law, 'the fact remains, however, that there are some issues which are inherently*

*unsuited to adjudication' and in this category of case, 'the Court acknowledges that the litigation process and the expertise of the Court are unsuited to resolving the question in hand*", (at p 121).

*A good definition of 'justiciability' can also be found in Chris Finn, The Concept of 'Justiciability' in Administrative Law in Groves & Lee, Australian Administrative Law (2007)*:

> *The term 'justiciability' refers to the suitability for, or amenability to, judicial review of a particular administrative decision or class of decisions. The term derives from the common law and reflects a series of self-imposed judicial restraints, themselves founded in a view as to the appropriate constitutional balance between the respective roles of the executive and the judiciary. Thus, a matter may be deemed 'non-justiciable' by a Court which feels that its resolution either is beyond the institutional competence of the Court or would involve stepping outside its appropriate constitutional role. (at p 143).*
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> (emphasis added)

**[40]** In *Tan Sri Musa Hj Aman & Ors v. Tun Datuk Seri Panglima Hj Juhar Hj Mahiruddin & Ors* [2021] 3 CLJ 87; [2021] 3 MLRA 503; [2021] 3 MLJ 329, the Court of Appeal held that dissolution of a State Assembly is a non-justiciable subject and consequently not amendable for judicial review. The Court of Appeal also held that the proclamation and dissolution of the State Legislative Assembly should be considered a matter within the Executive or Legislature's exclusive sphere that should not be encroached upon by the Judiciary. This is a matter that is best decided by the people directly involved in calling for the proclamation and dissolution of the State Legislative Assembly.

**[41]** Abu Bakar Jais JCA in delivering the judgment stated this:

> [86] However, what is equally obvious is the fact a dissolution of a state assembly, in this case the SLA, is not justiciable. Therefore, even though we agree with the appellants that the said provisions of the Sabah Constitution could be argued, litigated and determined for its effect and applicability in relation to the present appeal, this still would not assist the appellants in their argument before us. *At the risk of repetition, it could not assist the appellants because at the end of the day, a dissolution of a state assembly is a non-justiciable subject and consequently not amenable for judicial review*.
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> ...
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> [98] Likewise, the proclamation and *dissolution of the SLA should be considered a matter within the executive or legislature's exclusive sphere that should not be encroached by the judiciary. This is a matter that is best decided by the people directly involved in calling for the proclamation and dissolution of the SLA*. The first, second and the fourth respondents, are the persons and body most suited to decide under what circumstances and timing should the proclamation and dissolution of the SLA should take place. For practical reasons too, they would be in a much better position compared to the courts in making

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> the call for the end of term for the SLA. The dynamics of politics are within their better grasps than the courts in deciding this. Hence, this is a matter not suitable and appropriate for its review before the courts.
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> (emphasis added)

**[42]** The Federal Court in *Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal* [2019] 4 CLJ 561; [2019] 3 MLRA 183; [2019] 3 AMR 625; [2019] 3 MLJ 443 stated as follows:

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> [50] **There are certain areas which the court is reluctant to delve into. These include** the power of the state to enter into treaties and conduct of foreign policy, the defence of the realm and the control of the armed forces, the prerogative of mercy, **the dissolution of Parliament** and the appointment of Ministers. Such powers are governed by broader policy considerations which are more appropriately entrusted to the political branches of government, and which are unsuited to be examined by the courts. One such instance is the case of *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374 (HL) ('the *GCHQ* case').
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> (emphasis added)

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**[43]** Applying the decided case laws to the instant leave application, it is clear that the matter of dissolution of Parliament is non-justiciable. It is my view that the matter of dissolution of Parliament should be considered as a matter within the Executive or Legislature's exclusive sphere that should not be entertained by the Judiciary. This is a matter that is best decided by the people directly involved in calling for the dissolution of Parliament.

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**[44]** In the instant case, the subject matter involved is the proclamation and the dissolution of Parliament. Such dissolution of Parliament was in consequence of the consent given by the YDPA, acting in his own discretion under arts. 40(2)(b) and 55(2) of the FC upon request made by the first respondent. Therefore, it is apparent that with regard to the subject matter of proclamation and the dissolution of Parliament, this instant application is non-justiciable.

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*Frivolous And Arguable Case Of Granting The Reliefs Sought At The Substantive Hearing May Be The Resultant Outcome*

**[45]** In considering leave application, the applicant must also satisfy the court that this application is not frivolous and an arguable case of granting the reliefs sought at the substantive hearing may be the resultant outcome.

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**[46]** It is to be noted that the first respondent had received royal consent for Parliament to be dissolved as notified by P.U. (A) 320 dated 9 October 2022. The resultant effect of the dissolution is that a general election must be held within 60 days according to art. 55(4) of the FC.

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**[47]** It is undisputed that the YDPA had carefully considered the request of the first respondent and the YDPA was the person who decided on dissolution of Parliament under arts. 40(2)(b) and 55(2) of the FC based on the request given by the first respondent.

**[48]** At this juncture, I note the provision of arts. 40(1) and (1A) of the FC is as follows:

> **40 Yang di-Pertuan Agong to act on advice**
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> (1) In the exercise of his functions under this Constitution or federal law *the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet*, except as otherwise provided by this Constitution; but shall be entitled, at his request, to any information concerning the government of the Federation which is available to the Cabinet.
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> (1A) *In the exercise of his functions under this Constitution or federal law, where the Yang di-Pertuan Agong is to act in accordance with advice, on advice, or after considering advice, the Yang di-Pertuan Agong shall accept and act in.accordance with such advice*. (emphasis added)

**[49]** However, it must be stressed that the decision of dissolution of Parliament made by the YDPA under arts. 40(2)(b) and 55(2) of the FC was based on request made by the first respondent. The YDPA therefore acted in his discretion in performing his duties and is not bound by the advice of the Prime Minister or Cabinet unlike under arts. 40(1) and 40(1A) of the FC.

*The Prime Minister And The YDPA*

**[50]** The YDPA is a constitutional monarch and is the head of the State while Prime Minister is the head of the Government. The Executive power resides in the hand of the Prime Minister.

**[51]** Articles 40(1) and (1A) of the FC provides that the YDPA to be bound by the advice of the Cabinet in carrying out his functions, except for a few matters as provided under art. 40(2) of the FC (see: *Stephen Kalong Ningkan v. Tun Abang Hj Openg And Tawi Sli* [1966] 1 LNS 186; [1966] 1 MLRA 456; [1966] 2 MLJ 187; *Teh Cheng Poh v. PP* [1978] 1 LNS 202; [1979] 1 MLJ 50; [1978] 1 MLRA 321).

**[52]** The Prime Minister as the head of the Government has the sole power to appoint the Cabinet of his choice. The power that a Prime Minister possesses would include promoting, dismissing and appointing a Minister of his choice, at any time, for reasons he thinks fit.

**[53]** Emeritus Prof Datuk Dr Shad Saleem Faruqi in his book '*Our Constitution* Sweet & Maxwell Asia Thomson Reuters 2019 at p. 209' stated that the Prime Minister possesses the power to determine the meeting of Cabinet and matters to be discussed. He also stated that the Prime Minister is entitled to say what issues shall be reported to him personally or for decisions outside the Cabinet. As the Prime Minister, he is not bound by the Cabinet's advice. He may by his own initiative confront his colleagues and consult one or two ministers in the inner Cabinet to make decisions. He does not need to consult the Cabinet in budget proposals, in foreign policy initiatives or in advising the monarch in dissolving the Parliament.

**[54]** I am in full agreement with the view. This is because as the supreme leader, the first respondent does not need to consult his Cabinet in such matters. Matter such as a request for dissolution of Parliament is solely his decision to make. Hence, it is my considered view that since the dissolution of Parliament was made under arts. 40(2)(b) and 55(2) of the FC, the Cabinet's advice under arts. 40(1) and (1A) of the FC was not an issue. The YDPA acted in his own discretion to dissolve Parliament at the Prime Minister's request.

**[55]** Based on the above, it is my view that the Prime Minister, who held the ultimate power in the Executive does not need to consult his Cabinet in requesting for the dissolution of Parliament. I view that since the sole and ultimate power to request for the dissolution of Parliament lies solely in the hand of the Prime Minister, the contention of the applicant challenging the validity of the request to dissolve Parliament is of no merit. The dissolution of Parliament is a matter to be considered by the Executive. The issue is a non-justiciable issue. This has been decided by the Court of Appeal in *Tan Sri Musa Hj Aman & Ors* (*supra*) where Abu Bakar Jais JCA stated:

> [86] However, what is equally obvious is the fact a dissolution of a state assembly, in this case the SLA, is not justiciable. Therefore even though we agree with the appellants that the said provisions of the Sabah Consitution could be argued, litigated and determined for its effect and applicability in relation to the present appeal, this still would not assist the appellants in their argument before us. *At the risk of repetition, it could not assist the appellants because at the end of the day, a dissolution of a state assembly is a non-justiciable subject and consequently not amenable for judicial review*.
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> ...
>
> [98] Likewise, the proclamation and *dissolution of the SLA should be considered a matter within the executive or legislature's exclusive sphere that should not be encroached by the judiciary. This is a matter that is best decided by the people directly involved in calling for the proclamation and dissolution of the SLA*. The first, second and the fourth respondents, are the persons and body most suited to decide under what circumstances and timing should the proclamation and dissolution of the SLA should take place. For practical reasons too, they would be in a much better position compared to the courts in making the call for the end of term for the SLA. The dynamics of politics are within their better grasps than the courts in deciding this. Hence, this is a matter not suitable and appropriate for its review before the courts.
>
> (emphasis added)

**[56]** Therefore, for the above reasons, I am of the considered view that this leave application is non-justiciable, frivolous and more importantly, there is no arguable case of granting the reliefs sought at the substantive hearing may be the resultant outcome.

## Conclusion

**[57]** Based on the aforesaid reasons, I am of the view that the matter pertaining to the dissolution of Parliament is non-justiciable and it should be considered a matter within the Executive or Legislature's exclusive sphere that should not be entertained by the Judiciary with caution. Taking into account arts. 32(1), 40(2)(b) and 55(2) of the FC, it shows that the intention of the framers that any decision made by the YDPA in respect of the dissolution of Parliament is non-justiciable in any proceedings in court (*See Tan Sri Musa Hj Aman & Ors* (*supra*).

**[58]** This matter is frivolous as I am of the considered view that under the FC, the dissolution of Parliament is a decision specifically entrusted to the sole discretion of the YDPA. The YDPA is the ultimate decision maker with the constitutional authority to make a final and non-justiciable determination with legal effect for the dissolution of Parliament. The respondents named by the applicant have no such decision-making power under the FC. That power belongs to the YDPA. Since the respondents named by the applicant are not the decision-makers for the dissolution of Parliament, this leave application must fail.

**[59]** The applicant's application for leave to challenge the lawfulness of the dissolution and to prohibit the conduct of a general election therefore does not fulfil the threshold propounded in the cases of *WRP Asia Pacific Sdn Bhd* (*supra*) and *Tang Kwor Ham* (*supra*). More importantly, this subject is non-justiciable. This subject matter is therefore not amenable to judicial review.

**[60]** Based on the above reasons, this application for leave ought to be dismissed with no order as to costs.